CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted]348

THE EATON WATER WORKS COMPANY

vs.

THE CITY OF EATON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 26, 1910.

(26,807)

(26,307)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 840.

THE RATON WATER WORKS COMPANY

vs.

THE CITY OF RATON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1918.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 4941.

THE RATON WATER WORKS COMPANY, Appellant,

vs.

THE CITY OF RATON, Appellee.

Appeal from the United States District Court for the District of New Mexico.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that the record on the above appeal now pending before it discloses the following facts:

On July 2, 1915, The Raton Water Works Company brought a suit in the District Court of the United States for the District of New Mexico for the purpose of obtaining a decree enjoining The City of Raton, New Mexico, its officers, agents, employees and attorneys, from permitting or authorizing any of the inhabitants thereof, to connect their water pipes with the mains of a system of water works constructed by said City, or from supplying to any such inhabitants water from the mains of said system either under contract to pay therefor or gratuitously and from using water from said system for fire, hydrant, or other municipal purposes or operating said system in any manner.

The Water Works Company and The City of Raton were
2 both Corporations of New Mexico, and the jurisdiction of the District Court to entertain the suit, was based solely upon the ground that it was one arising under the Constitution of the United States. From the logical and orderly statement of the plaintiff's cause of action in its complaint, it appeared that the plaintiff claimed that by virtue of an ordinance granted to it by the Town of Raton, New Mexico, it had an exclusive franchise and right to construct, operate and maintain water works for supplying said Town and the inhabitants thereof with water for a period of twenty-five years from July 15, 1891; that the City of Raton was the successor of the Town of Raton and bound by the terms of said ordinance; that on July 16, 1913, the City of Raton passed an ordinance authorizing the construction by said City of a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by said City, and also authorizing the issuance of the negotiable bonds of said City to the amount of Three Hundred Thousand Dollars for the purpose of providing funds for the construction of said system of water works. That said bonds were issued and the system of water works practically completed when this suit was commenced; that by reason of the facts alleged the obligation of

the contract or ordinance granting the plaintiff an exclusive franchise was being impaired and plaintiff's property taken without due process of law and plaintiff deprived of the equal protection of the laws, contrary to the Constitution of the United States.

The ordinance granting the plaintiff an exclusive franchise for twenty-five years contained the following proviso: "Provided, however, that if said Company (plaintiff) shall neglect or fail for any reason within its control to furnish a supply of wholesome water as herein provided, the trustees shall have power to force said Company to do so by fines not less than Three Hundred Dollars
3 nor more than One Thousand Dollars for the first offense, and if such failure shall continue for a period of thirty-days, said Board of Trustees shall have the power to revoke this franchise."

The defendant City of Raton among other things pleaded a violation of the proviso in justification of its right to construct a water works system of its own, and to revoke plaintiff's franchise. On a hearing had in the District Court on pleadings and proofs April 25, 1916, that court dismissed the orginial bill of complaint "upon the ground that the plaintiff in and during a number of years immediately preceding the filing of the original bill herein, failed to furnish said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes."

It dismissed plaintiff's supplemental bill of complaint which complained of the revocation of plaintiff's franchise on the ground that the ordinance granting the franchise gave the right to revoke the same on the failure to furnish wholesome water by the plaintiff, which failure the court found had been proven. On questions raised by an amendment to the bill of complaint and answer thereto, the trial court rendered judgment in favor of the plaintiff and against the defendant for hydrant rentals accruing between July 1, 1912, to July 1, 1915, the amount allowed being about half the amount claimed.

A motion is made in this court by appellee to dismiss the appeal to this court for the reason that an appeal from the decree of the District Court to the Supreme Court of the United States was plaintiff's exclusive remedy. It is further certified that the following question of law arises from the record and is presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon said question:

4 *Question.*

1. Has this Court jurisdiction of the appeal?

JOHN E. CARLAND,
CHARLES F. AMIDON,
THOS. O. MUNGER,
Constituting the Judges to Whom the Case Certified was Presented.

5 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of The Raton Water Works Company, Appellant, vs. The City of Raton, No. 4941, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-third day of January, A. D. 1918.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

6 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, December Term, 1917. No. 4941. The Raton Water Works Company, Appellant, vs. The City of Raton. Certificate of Question to Supreme Court of the United States. Filed Jan. 22, 1918. E. E. Koch, clerk.

Endorsed on cover: File No. 26307. U. S. Circuit Court Appeals, 8th Circuit. Term No. 840. The Raton Water Works Company vs. The City of Raton. (Certificate.) Filed January 30th, 1918. File No. 26307.

27

MAR 24
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917

No. [redacted]348

THE RATON WATER WORKS COMPANY

v.

THE CITY OF RATON.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PLAINTIFF.

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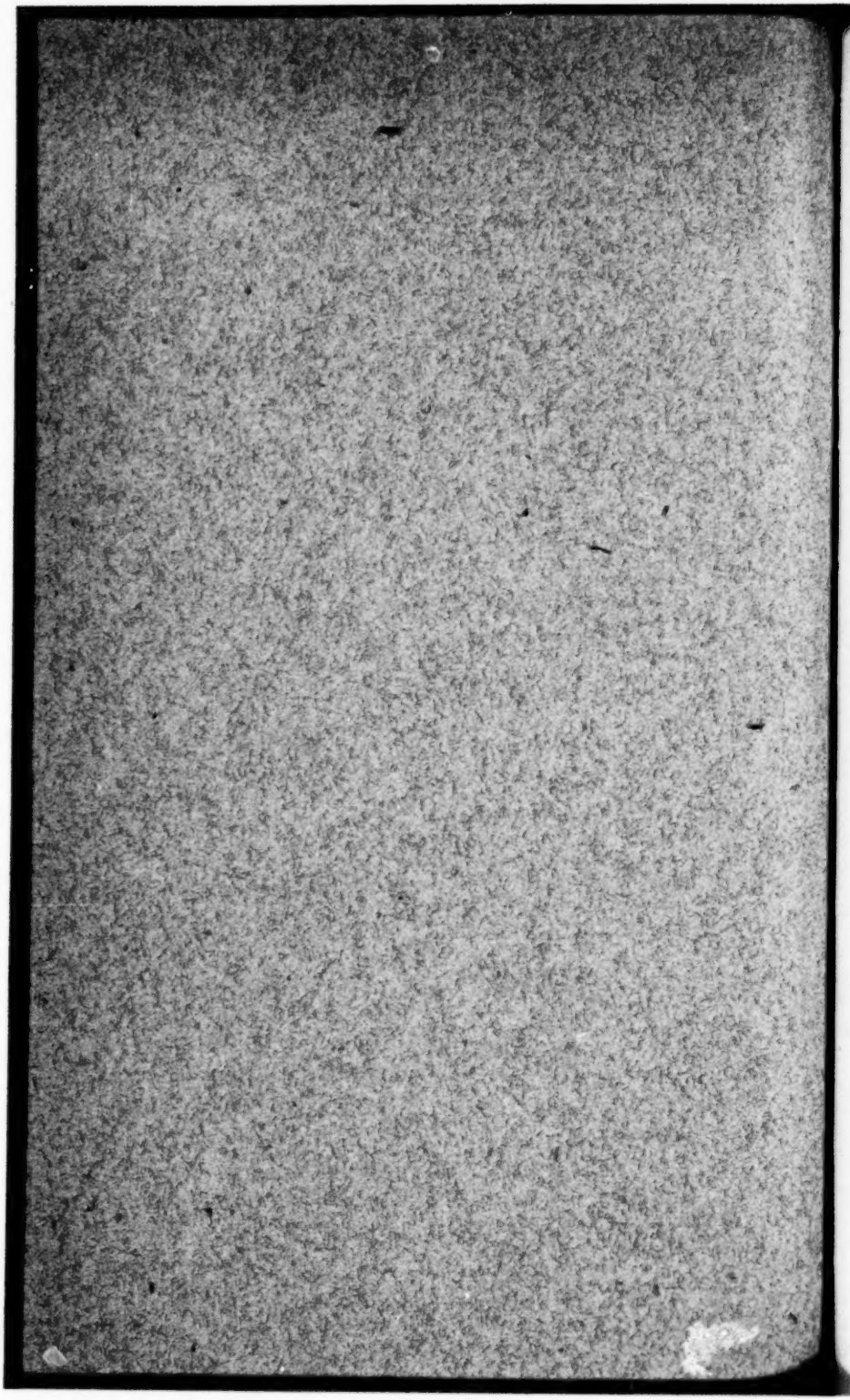

SUPREME COURT
OF THE UNITED STATES.

THE RATON WATER WORKS COMPANY, *against* THE CITY OF RATON.	October Term, 1917. No. 840.

BRIEF FOR PLAINTIFF.

Statement.

This case comes before this Court on a Certificate from the CIRCUIT COURT OF APPEALS, for the EIGHTH CIRCUIT, of the question: Has the CIRCUIT COURT OF APPEALS jurisdiction of the appeal taken by the plaintiff from the judgment of the DISTRICT COURT of the UNITED STATES for the DISTRICT OF NEW MEXICO (Record, p. 2, fol. 3). . .

It is certified by the UNITED STATES CIRCUIT COURT OF APPEALS that the record on the appeal in said action now pending before it, discloses the following facts:

(1) That the Water Works Company and the City of Raton were both corporations of New Mexico and that the jurisdiction of the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

(2) That the constitutional question involved was based on the alleged impairment of the contract rights of the Water Works Company under

the ordinance of the Town of Raton, of which town the City of Raton is the successor, granting to said Water Works Company an exclusive franchise and right to construct, operate and maintain water works for supplying said town and the inhabitants thereof with water for a period of twenty-five years from July 15, 1891.

(3) That the impairment and violation referred to was occasioned by the passage by the City of Raton, on July 16, 1913, while the contract of the Water Works Company remained in full force and effect, of an ordinance authorizing the construction by said City of a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by said City, and also authorizing the issuance of negotiable bonds of said City to the amount of Three hundred thousand dollars for the purpose of providing funds for the construction of said system of water works.

(4) That the franchise granted to the Water Works Company contained a proviso that if the Company should neglect or fail for any reason within its control, to furnish a supply of wholesome water, the trustees of the Town should have power to force said Company to do so by the imposition of fines, not less than Three hundred dollars nor more than One thousand dollars for the first offense, and if such failure should continue for a period of thirty days, by revoking the franchise.

(5) That the present action was brought by the Water Works Company on July 2, 1915, for the purpose of obtaining a decree enjoining the City of Raton, its officers and agents, from permitting or authorizing any of the inhabitants

thereof to connect their water pipes with the mains of the system of water works constructed by the City, or from supplying to any such inhabitants water from the mains of said system, either under contract to pay therefor or gratuitously, and from using the water from said system for fire, hydrant or other municipal purposes or operating said system in any manner.

(6) That the City of Raton, among other things, pleaded a violation of the proviso above mentioned in justification of its right to construct a water works system of its own and to revoke the Water Works Company's franchise.

(7) That on pleadings and proofs the DISTRICT COURT denied the injunctive relief sought upon the ground that the Water Works Company in and during a number of years immediately preceding the filing of the Bill of Complaint failed to furnish the town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, which failure the Court found had been proven, but rendered judgment in favor of the Water Works Company for hydrant rentals accruing between July 1, 1912, and July 1, 1915, for about half the amount claimed. (See Record, pp. 1, 2, fols. 1-3).

From the judgment the Water Works Company appealed to the CIRCUIT COURT OF APPEALS for the EIGHTH CIRCUIT, and a motion was made by the appellee to dismiss the appeal for the reason that an appeal to the SUPREME COURT OF THE UNITED STATES was the plaintiff's exclusive remedy (Record, p. 2, fol. 3). Thereupon the CIRCUIT COURT OF APPEALS certified that a question of law had arisen, the decision of which was indispensable to a determination of the cause, and to the

end that the Court might properly discharge its duty it desired the instruction of the SUPREME COURT upon the question: "HAS THIS COURT JURISDICTION OF THE APPEAL"? (Record, p. 2, fols. 3, 4).

ARGUMENT.

POINT I.

The appeal was properly taken to the Circuit Court of Appeals and that Court has jurisdiction to hear and determine the same.

First: No diversity of citizenship exists between the parties and federal jurisdiction was invoked solely on the ground that a State law (the City ordinance) impaired the obligation of a contract (the plaintiff's franchise) in contravention of the contract clause of the Constitution. The jurisdictional question was decided in the plaintiff's favor and on the appeal taken by it to the CIRCUIT COURT OF APPEALS, no error was alleged on that point.

Indeed, there can be no doubt whatsoever on the jurisdictional question, because federal jurisdiction of a cause arising under the facts existing in the present controversy has been established by repeated declarations of this Court in, among others, the following cases:

Walla Walla *v.* Walla Walla Water Works Co., 172, U. S. 1;
Vicksburg Water Co. *v.* Vicksburg, 185 U. S., 65;
Mercantile T. & D. Co. *v.* Columbus, 203 U. S., 311;
Vicksburg *v.* Hausen, 231 U. S., 259.

Second: The jurisdictional question having been decided in favor of the appellant it could not, of course, complain on that ground on appeal, and any attempt by it to question it for the purpose of raising a constitutional question to support a direct appeal to this Court would have been wholly unwarranted and frivolous and the appeal would have been dismissed.

Brolan *v.* United States, 236 U. S., 216;
Weber *v.* Freed, 239 U. S., 325;
Wabash R. R. Co. *v.* Hayes, 234 U. S., 86;
Consolidated Turnpike Co. *v.* Norfolk &c. Ry. Co., 228 U. S., 596;
Equitable Life Assurance Society *v.* Brown, 187 U. S., 308, 314;
Rakes *v.* United States, 212 U. S., 55;
Hannis *v.* Baltimore, 216 U. S., 285;
Knop *v.* Monongahela etc. Co., 211 U. S., 485;
U. S. v. Jahn, 155 U. S., 109.

In the latter case it was said by this Court:

> "If the question of jurisdiction is in issue and the jurisdiction sustained and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it."

Third: But the present case involves other questions not exclusively cognizant on appeal by the Supreme Court, and it was on such other questions that the Trial Court rendered judgment in favor of the defendant, and an appeal to the Circuit Court of Appeals was the plaintiff's exclusive remedy.

The earlier decisions seem to have inclined to the theory that where any constitutional question is involved, the appeal must be direct to the Supreme Court under SECTION 238 of the JUDICIAL CODE, which is the same as ACT MARCH 3, 1891, SEC. 5. The later cases, however, lay down the rule that if a party comes into the federal court alleging a violation of a constitutional right, and the Court sustains its jurisdiction on that ground, the mere fact that there was such a question in the case does not authorize him to appeal to the SUPREME COURT but that the decision against him if on other grounds may be reviewed by appeal to the CIRCUIT COURT OF APPEALS.

> Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S., 376;
> Lampasas *v.* Bell, 180 U. S., 276;
> Pikes Peak Power Co. *v.* Colorado Springs, 105 Fed. Rep., 1.

In the ANGLO-AMERICAN case the parties were both citizens of the same state and federal jurisdiction was invoked on the ground that a State law was claimed to be in contravention of the Constitution of the United States. The federal jurisdiction was sustained by the CIRCUIT COURT, but the plaintiff's bill was dismissed on the merits. An appeal was taken by plaintiff direct to the SUPREME COURT, upon the supposition that it was a case in which a law was claimed to be in contravention of the CONSTITUTION of the UNITED STATES. This Court dismissed the appeal for the reason that it had no jurisdiction, but such jurisdiction lay in the CIRCUIT COURT OF APPEALS. This Court said:

> " * * * 'In any case in which the Constitution or law of the State is claimed

to be in contravention of the Constitution of the United States.' Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this Court whenever the decision is against him, no matter on what grounds, although his contention about the State law is sustained. If the party comes into the Circuit Court alleging that a State law is unconstitutional and the Circuit Court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this Court on grounds that otherwise would not support an appeal. (See Lampasas *v.* Bell, 180 U. S., 276; 45 L. Ed. 527; 21 Sup. Ct. Rep. 368). The present case illustrates the principle. The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the Circuit Court upon the question mainly of fact as to good faith, etc. of Weed in taking the assignment of the judgment. The provisions of Sec. 5 of the Act of 1891 were not intended to be made an instrument for such attempts."

In the PIKES PEAK case the parties were citizens of the same state and federal jurisdiction was invoked solely upon the proposition that a State law (municipal ordinance) impaired the obligations of a contract in violation of the CONSTITUTION of the UNITED STATES, under the rule laid down in WALLA WALLA *v* WALLA WALLA WATER WORKS COMPANY, 172 U. S., 1, just as was true in the case at bar. The CIRCUIT COURT OF APPEALS for the EIGHTH CIRCUIT, upheld the right of appeal to that Court.

The authorities referred to clearly uphold the right of the plaintiff to appeal to the Circuit Court of Appeals in the case at bar.

The question of federal jurisdiction was de-

cided in the plaintiff's favor, and the DISTRICT COURT proceeded to determine the rights of the parties upon the merits:

(1) In the defendant's favor upon the ground that the franchise granted to the plaintiff contained a proviso that the trustees of the town should have the power to revoke the same if the Company neglected or failed to furnish a supply of wholesome water, which failure the Court found had been proven.

(2) In the plaintiff's favor for hydrant rentals accruing, the amount allowed being about half the amount claimed.

The plaintiff could not appeal from the judgment so far as the federal question was concerned, because that question had been decided in its favor. Its only complaint could be of the judgment on the merits rendered against it on the ground that it had broken its contract by its failure, as found, to supply wholesome water, and that the amount awarded to it for hydrant rentals was less than the amount to which it was justly entitled.

For the purpose of reviewing the judgment on these grounds an appeal to the Circuit Court of Appeals was the plaintiff's exclusive remedy.

POINT II.

Even if an appeal to the Circuit Court of Appeals was not the plaintiff's exclusive remedy, it at best had an election to appeal to that Court or to take its appeal direct to the Supreme Court, and the appeal having been taken to the Circuit Court of Appeals that Court should hear and determine the same.

Carter *v.* Roberts, 177 U. S. 496;
Cincinnati H. & D. R. R. Co. *v.* Thiebaud, 177 U. S., 615;
Hooper v. Remmel, 165 Fed. Rep., 336;

In CARTER *v.* ROBERTS, (*Supra,*) the question was whether a sentence of an army court martial imposed a double punishment for the same offense in violation of the Constitutional provision. An appeal had been taken to the UNITED STATES CIRCUIT COURT OF APPEALS and a decision rendered upholding the sentence. An appeal thereafter was taken to the SUPREME COURT. In dismissing the appeal to this Court, CHIEF JUSTICE FULLER said:

> "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the Constitutional question and afterwards proceed to judgment or may decide the whole case in the first instance. (Holt *v.* Indiana Mfg. Co., 46 U. S. App., 717, 80 Fed. Rep., 1; 25 C. C. A. 301, 176 U. S., 68, ante 374, 20 Sup. Ct. Rep. 272; United States *v.* Jahn, 155 U. S., 109, 39

L. ed. 87, 15 Sup. Ct. Rep. 39; New Orleans *v.* Benjamin, 153 U. S., 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Benjamin *v.* New Orleans, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298)".

In HOOPER *v.* REMMEL, (*Supra,*) it was said by the CIRCUIT COURT OF APPEALS, (EIGHTH CIRCUIT) upholding its jurisdiction in that case:

> "From this analysis of the petition it appears that the grounds relied upon by petitioner for his release involved not only the constitutional and validity of the Act, but the construction and effect of State statutes and the regularity and effect of proceedings taken to disqualify the petitioner from practicing on the reservation. If the case involved the constitutional validity of the Act or the construction or application of the Constitution of the United States, and nothing else, this Court would have no jurisdiction on the appeal. It would have rested exclusively in the Supreme Court of the United States. Spreckles Sugar Refining Co. *v.* McClain, 192 U. S., 397, 407; 24 Sup. Ct. Rep. 376; 48 L. ed. 496; Harris *v.* Rosenberger, 145 Fed. Rep., 449; 76 C. C. A., 225; 13 L. R. A. (N. S.) 762. BUT AS THE CASE INVOLVES OTHER QUESTIONS NOT EXCLUSIVELY COGNIZABLE ON APPEAL BY THE SUPREME COURT, THE APPELLANT HAD HIS ELECTION TO BRING IT TO THIS COURT, AND IT BECOMES OUR DUTY TO ENTERTAIN THE APPEAL AND DISPOSE OF IT."

In the case at bar the construction of a State statute (municipal ordinance) was involved as well as the question whether the plaintiff had violated its contract by refusing to furnish a supply of wholesome water and what amounts, if any, were due to it for hydrant rentals accrued.

It is from the decision by the DISTRICT COURT on these grounds, which was against the plaintiff's

contentions, and not from the decision on the jurisdictional question, which was in its favor, that the plaintiff appealed.

Even if, therefore, an appeal to the CIRCUIT COURT OF APPEALS was not the plaintiff's exclusive remedy, it at least had its election to appeal to that court and it became the duty of that court to entertain the appeal and dispose of it.

POINT III.

The question certified should be answered in the affirmative.

Respectfully submitted,

ABRAM J. ROSE,
JESSE G. NORTHCUTT,
HENRY W. COIL,
Of Counsel for Plaintiff.

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In the Supreme Court of the United States.

October Term, 1917

No. 840

THE RATON WATER WORKS COMPANY,

vs.

THE CITY OF RATON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR DEFENDANT

This cause comes before this Court upon a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, submitting to this Court the following question:

"Has this Court (Circuit Court of Appeals) jurisdiction of the appeal?" (Record P. 2, Fol. 3.)

1. STATEMENT OF CASE

The judges of the Circuit Court of Appeals of the Eighth Circuit have prepared as clear and brief a statement of the facts as can be made. Therefore, we adopt that statement as our statement of the case. It is found in the Record at pp. 1 and 2, Fol. 1 to 4.

2. QUESTION SUBMITTED

(a) Jurisdiction of Trial Court

The question submitted must not be confused with the question of jurisdiction of the trial court. The jurisdiction of the trial court is not in issue upon this certificate. However, the basis of the jurisdiction of the trial court must be considered for the purpose of determining whether or not the Circuit Court of Appeals of the Eighth Circuit had jurisdiction to review the decision of the trial court. The parties were citizens of the same state. The cause did not involve the construction or application of any Act of Congress or treaty of the United States. The sole basis of jurisdiction of the trial court was that the case arose under the Constitution of the United States. (Record P. 1, Fol. 2.) It involved the application and construction of the Constitution of the United States with respect to certain acts alleged to have been committed, or about to be committed, by the City of Raton. It also involved the question of whether certain ordinances passed by the City of Raton violated provisions of the United States Constitution. The jurisdiction of the trial court to entertain the suit being based solely upon the ground that it was one arising under the Constitution of the

United States, the question submitted is: Does the Circuit Court of Appeals have jurisdiction to review said case?

(b) The Jurisdiction of the Circuit Court of Appeals

The power of a Circuit Court of Appeals to review the decision of a District Court depends upon Acts of Congress. From the authorities hereafter cited it will clearly appear that where the sole ground of jurisdiction of a federal court is the fact that a cause involves the construction and application of the Constitution of the United States, or is a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, appeals and writs of error must be taken direct to the Supreme Court and the Circuit Courts of Appeals do not have jurisdiction of such causes.

Federal jurisdiction depending solely upon the ground that the case was one arising under the Constitution of the United States, it axiomatically follows that the case was one which involved the construction and application of the Constitution of the United States, or was one in which the constitution or a law of a state was claimed to be in contravention of the Constitution of the United States. There is an implied contention in the brief of plaintiff to the effect that the appeal in this case does not involve the construction or application of the Constitution of the United States, and does not require the appellate court to pass upon the question of whether or not certain ordinances of the City of Raton violate the provisions of the Constitution of the United States.

It is claimed that the appeal simply involves the construction of certain ordinances. It is true there is involved in the case the question of the terms of the contract between the water company and the City, and to determine what the terms of such contract are, it is necessary for the Court to construe the language used in a certain ordinance. The determination of the terms of the contract and the construction of the language used is only incidental to the determination of the main question in the cause, which is: Did the acts which the City of Raton had committed, or was about to commit, deprive the plaintiff of any of its rights under the Constitution of the United States?

This was the ultimate question which the trial court had to determine, and is the ultimate question which any court reviewing the decision of the trial court must determine.

The plaintiff alleged that it had a certain contract which it entered into with the predecessor of the City of Raton, to-wit, the Town of Raton, which was binding upon the City of Raton. It is admitted that the City of Raton was the successor of the Town of Raton and was bound by the contract to the same effect as the town would have been bound. The plaintiff also alleged that certain acts already committed by the City of Raton and certain other acts about to be committed by it, did and would deprive the plaintiff of the equal protection of the laws, would constitute a taking of plaintiff's property without due process of law, and would impair the obligation of plaintiff's contract, all contrary to the Constitution of the United States.

The judicial investigation instituted by the commencement of this action required the court to determine the facts and apply to such facts the provisions of the Constitution of the United States which the plaintiff claimed were being violated. The trial court did this, and the plaintiff is seeking to have its decision reviewed.

The cause being one in equity, the reviewing court may review questions of fact as well as questions of law. Whether or not it comes to the same conclusion with respect to the facts as did the trial court, the appellate court must apply the provisions of the Constitution of the United States to the facts and must determine whether or not the acts which were committed, or were about to be committed, by the City of Raton, deprived the plaintiff of the equal protection of the laws, constituted a taking of its property without due process of law, or impaired the contract of the plaintiff, contrary to the Constitution of the United States as alleged in plaintiff's complaint for the purpose of invoking the jurisdiction of the District Court. The cause which the plaintiff must submit to an appellate court is the same as it submitted to the trial court. In every litigated matter it is necessary for a court to pass upon incidental matters, such as the admissibility of evidence, the construction of writings, the order of proof, the conduct of the litigation and many other things, but the passing upon these matters, either rightly or erroneously, does not change the nature of the cause presented, nor the subject matter of the litigation. No decision of the cause, either by the trial court or by an appellate court, can be made without a determination of the constitutional questions involved.

The decree of the trial court denied to the plaintiff the relief it claimed under the Constitution of the United States. The purpose of plaintiff's appeal is to have the appellate court grant to it the relief it claims under the Constitution of the United States. Therefore, its exclusive remedy was to have the Supreme Court review such decision, and a Circuit Court of Appeals has no jurisdiction to review the cause.

3. AUTHORITIES RELIED UPON BY DEFENDANT

That the question submitted by the Circuit Court of Appeals for the Eighth Circuit must be answered in the negative is established by the following authorities:

Judicial Code, Section 128

Judicial Code, Section 238.

Zoline's Federal Appellate Jurisdiction and Procedure, Chap. 5, Section 27, p. 67.

Union & Planters Bank vs. Memphis, 189 U. S. 71-73.

Carolina Glass Co. vs. S. Carolina, 240 U. S. 305-318.

American Sugar & Refining Co. vs. New Orleans, 181 U. S. 277-281.

Huguley Manufacturing Co. vs. Galeton Cotton Mills, 184 U. S. 290-295.

Vicksburg vs. Water Works Co., 202 U. S. 453-458.

Penn Mutual Life Ins. Co. vs. Austin, 168 U. S. 685-693.

Barr vs. Mayor, etc. of City of New Brunswick, et al. (C. C. A., 3rd Circuit), 72 Fed. 689.

Hamilton vs. Brown (C. C. A., 5th Circuit), 53 Fed. 753-757.

Railroad Commission vs. Morgans L. T. R. & S. S. Co. (C. C. A., 5th Circuit), 195 Fed. 66.

Collins vs. Board of Control (C. C. A., 5th Circuit), 219 Fed. 885.

City of Owensboro vs. Owensboro Waterworks Co. (C. C. A., 6th Circuit), 115 Fed. 318-322.

City of Paducah vs. East Tenn. Telephone Co. (C. C. A., 6th Circuit), 182 Fed. 625.

City of Indianapolis vs. Central Trust Co. (C. C. A., 7th Circuit), 83 Fed. 529.

Chicago, Milwaukee & St. Paul R. R. Co. vs. Evans (C. C. A., 8th Circuit), 58 Fed. 433.

Hastings vs. Ames (C. C. A., 8th Circuit), 68 Fed. 726.

Davis vs. Burk (C. C. A., 9th Circuit), 97 Fed. 501.

City of Seattle vs. Thompson (C. C. A., 9th Circuit), 114 Fed. 96.

4. DISCUSSION OF AUTHORITIES RELIED UPON BY DEFENDANT

Insofar as Sections 128 and 238 of the Judicial Code apply to this case, they provide that:

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court." (Section 128.)
>
> "Appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court * * * in any case that involves the construction or application of the Constitution of the United States * * * and in any case in which the constitution or law of a state are claimed to be in contravention of the Constitution of the United States." (Section 238.)

It is clear that it was the intention of Congress in enacting this Judicial Code to distribute appellate jurisdiction between the Circuit Court of Appeals and the Supreme Court. It carved out of the whole field of appellate jurisdiction certain classes of cases and vested appellate jurisdiction in such cases in the Supreme Court, and only gave to the Circuit Court of Appeals appellate jurisdiction in such cases as were excluded from the appellate jurisdiction of the Supreme Court.

All Federal Courts are courts of limited jurisdic-

tion. In order that a Federal Court may exercise jurisdiction in any case, the authority to do so must be found either in the United State Constitution or the Acts of Congress. The Circuit Court of Appeals derives its sole power to exercise jurisdiction from Acts of Congress. Congress has excluded from the appellate jurisdiction of the Circuit Courts of Appeals, cases involving the construction or application of the Constitution of the United States and cases in which the constitution or laws of the states are claimed to be in contravention of the Constitution or the United States. Therefore, these provisions of the Judicial Code require the question submitted to be answered in the negative.

There have been cases where the basis of the jurisdiction of a Federal Court was diversity of citizenship, and in such cases it has sometimes been necessary to pass upon questions arising under the Constitution of the United States. Such cases have called for a discussion of these code provisions or of the similar provisions known as Sections 5 and 6 of the Act of March 3, 1891. There are other cases where the sole basis of the jurisdiction of a Federal Court is the fact that the case does involve a construction or application of the Constitution of the United States.

After a careful study of the decisions, Zoline, in his work on Federal Appellate Jurisdiction and Procedure, *supra*, lays down the rule:

> "When no diversity of citizenship exists and the sole ground of the jurisdiction of the United States District Court is a claim or privilege under the Constitution of the

> United States, an appeal or writ of error must be taken directly to the United States Supreme Court and not to the United States Circuit Court of Appeals, the jurisdiction of the Supreme Court being exclusive."

Supreme Court Decisions:

In Union & Planters Bank vs. Memphis, *supra*, this Court laid down the same rule. The Union & Planters Bank, a Tennessee corporation, brought its action against the City of Memphis, a Tennessee corporation, to enjoin the collection of certain taxes upon the ground that the law under which the assessment was made impaired the obligation of its charter contract. The lower court sustained a demurrer to the plaintiff's complaint and an appeal was taken to the Circuit Court of Appeals, where the decree of the lower court was affirmed. Thereupon an appeal was taken from the Circuit Court of Appeals to the Supreme Court. The Supreme Court said:

> "Diversity of citizenship did not exist and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay direct to this court under Section 5 of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals. American Sugar Refining Co. vs. New Orleans, 181 U. S. 277. Nevertheless, an appeal having been prosecuted to the latter Court and having there gone to decree, an appeal was allowed to this Court because the judgment was not made final in that

> Court by Section 6 of the Act, but the case, being here and the jurisdiction of the Circuit Court having depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the Circuit Court of Appeals not on the merits but by reason of the want of jurisdiction in that Court."

In Carolina Glass Co. vs. South Carolina, *supra*, an action was brought by the Carolina Glass Company, a corporation of South Carolina, against the State of South Carolina. A demurrer to the complaint was sustained by the lower court. A writ of error was taken to the Circuit Court of Appeals, where the decision of the lower court was affirmed, and a writ of error was taken from the decision of the Circuit Court of Appeals to the Supreme Court. The Supreme Court reversed the judgment of the Circuit Court of Appeals and remanded the cause to that Court, with directions to dismiss the writ of error improperly entertained, on the ground that there was no allegation of diversity of citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution and consequently the Circuit Court of Appeals was without jurisdiction to review.

These two cases pass directly upon the question submitted by the Circuit Court of Appeals for the Eighth Circuit. As stated in the certificate

> "the jurisdiction of the District Court to entertain the suit was based solely

> upon the ground that it was one arising under the Constitution of the United States."

(Record, page 1, Folio 2) The two decisions of the Supreme Court above referred to are direct applications of the rules previously announced by it.

> American Sugar Refining Co. vs. New Orleans, *supra.*
>
> Huguley Manufacturing Co. vs. Galeton Cotton Mills, *supra.*

Illustrations of the exercise of appellate jurisdiction by this Court of cases similar to the one in which the question is submitted are:

> Vicksburg vs. Water Works Co., *supra.*
>
> Penn Mutual Life Ins. Co. vs. Austin, *supra.*
>
> Columbus vs. Mercantile Trust & Deposit Co., 218 U. S. 645.
>
> Farmers Loan & Trust Co. vs. Galesburg, 133 U. S. 156.

Decisions of Circuit Courts of Appeals:

Not only has the Supreme Court directly decided in the two cases above cited, that the Circuit Court of Appeals does not have appellate jurisdiction of a case such as presented by the record herein, but the Circuit Courts of Appeals of many circuits have likewise decided the question.

In Barr vs. Mayor, etc., *supra,* it is said:

> "The only question in this appeal is whether the proposed acts of appellees, the defendants below, under an ordinance of the city of New Brunswick, New Jersey, would be contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the appellant of his property without due process of law. Clearly the case is one which 'involves the construction or application of the Constitution of the United States' or in which 'the law of a state is claimed to be in contravention of the Constitution of the United States'; and, therefore, under Sections 5 and 6 of the Act to establish Circuit Courts of Appeal, etc., approved March 3, 1891, this court has no jurisdiction to review the decision of the Court below upon that question."

In Hamilton vs. Brown, *supra*, a similar rule is announced.

In Railroad Commission vs. Morgan's Co., *supra*, it is said:

> "The parties plaintiff and defendant are citizens of the State of Louisiana. Diversity of citizenship therefore does not exist. The jurisdiction of the Circuit Court was invoked solely on the

> ground that the suit was one arising under the Constitution of the United States, in that it involved the construction and application of the Commerce clause of the Constitution * * * It is well settled that under the Fifth section of the Act of March 3, 1891, * * * appeals in suits of this character should go direct to the Supreme Court. * * * The motion to dismiss the appeal should be granted and it is so ordered."

The same rule is announced in

Collins vs. Board of Control, *supra*.

Owensboro vs. Owensboro Waterworks Co., *supra* (in which many decisions are considered.)

City of Paducah vs. East Tenn. Tel. Co., *supra*

City of Indianapolis vs. Central Trust Co. *supra*.

Chicago, Milwaukee & St. Paul Co. vs. Evans, *supra*.

Hastings vs. Ames, *supra*.

Davis vs. Burk, *supra*.

City of Seattle vs. Thompson, *supra*.

In view of all these decisions the rule of law is that where the jurisdiction of a Federal Court rests solely on the ground that the cause of action arose under the Constitution of the United States, the appeal or writ of error must be taken directly to

the Supreme Court and that the Circuit Court of Appeals does not have jurisdiction; and if it is attempted to take an appeal or writ of error to the Circuit Court of Appeals that Court must dismiss the appeal or writ of error.

5. POINT I OF PLAINTIFF

The plaintiff has sub-divided its Point I into three parts. The first contention, as we understand it, is that the trial court had jurisdiction because the case was one arising under the Constitution of the United States and this was the sole ground of jurisdiction. There is no dispute about this proposition. The cases cited in this sub-division are cases which establish the right of a plaintiff to bring a cause, such as the certificate of the Circuit Court of Appeals shows this cause to be, in the Federal Court, on the sole ground that a United States constitutional question is involved.

In the case of Walla Walla vs. Walla Walla Waterworks Co., 172 U. S. 1, a similar action was brought in the Federal Court on the sole ground that a constitutional question was involved. The appeal, however, was direct to the Supreme Court and not to the Circuit Court of Appeals. The Supreme Court assumed jurisdiction and decided the case.

In the case of Vicksburg Water Co. vs. Vicksburg, 185 U. S. 65, the lower court had dismissed the case on the ground that no federal question was involved. The question of the trial court's jurisdiction was certified to the Supreme Court, which held that the District Court did have jurisdiction, because the

cause involved the construction and application of the Constitution of the United States.

The question as to where an appeal should be taken after final decision was not discussed or determined in the case.

In Mercantile T. & D. Co. vs. Columbus, 203 U. S. 311, the lower court dismissed the bill of complaint on the ground that it did not have jurisdiction, and the question of its jurisdiction was certified to the Supreme Court. The Supreme Court reversed the decision, holding that the complaint stated a cause of action involving a construction and application of the Constitution of the United States, and remanded the case to the lower court for hearing upon the merits. In the decision referred to, nothing was said about where an appeal should be taken after final decision, but after the case was tried and a final decision rendered, an appeal was taken direct to the Supreme Court.

City of Columbus vs. Mercantile T. & D. Co., 218 U. S. 645.

The Supreme Court entertained jurisdiction and reversed in part the decision of the lower court.

In the case of Vicksburg vs. Hansen, 231 U. S. 259, the original ground of jurisdiction of the Federal Court was diversity of citizenship, although the complaint was afterwards amended so as to raise a constitutional question. Because of the diversity of citizenship an appeal was first taken to the Circuit Court of Appeals, and afterwards the cause was appealed to the Supreme Court.

These cases are not authority for taking an appeal to the Circuit Court of Appeals in the case at

bar. On the contrary, they indicate that the appeal in this case should have been taken direct to the Supreme Court.

In the second part of Point I it appears that plaintiff's contention is that the constitutional question involved is frivolous, and because it is frivolous, no direct appeal could be taken to the Supreme Court. If it be true that the constitutional question is frivolous, the plaintiff imposed upon the trial court. The same constitutional rights which the plaintiff sought to enforce in the trial court it is now seeking to enforce in an appellate court. The plaintiff in the trial court sought to enjoin the defendant from operating a municipally constructed water works system, on the ground that such operation would deprive the plaintiff of its property without due process of law and impair the obligation of its contract with the defendant. It also sought to enjoin the enforcement of an ordinance revoking plaintiff's franchise and requiring it to remove its pipes from the streets and alleys of the defendant city, upon the ground that such ordinance impaired the obligation of plaintiff's franchise contract and constituted a taking of its property without due process of law. It also sought to enforce in the same proceeding and in connection with the injunctive relief sought by it, and upon the same constitutional grounds, the payment by the city of certain fire hydrant rentals, which the city had refused to pay because of its contention that the plaintiff had forfeited its rights under the contract.

The trial court denied the injunctive relief sought by the plaintiff, but gave it judgment for a portion of the fire hydrant rentals claimed. The plaintiff is seeking to have the decree of the trial court reversed.

The trial court decided that because the plaintiff had failed to furnish good and wholesome water as required by the terms of its franchise, the operation of the said municipally owned plant did not constitute an impairment of the obligation of plaintiff's franchise contract, and did not constitute a taking of plaintiff's property without due process of law. It likewise decided that the revocation of plaintiff's franchise and the requirement that it remove its pipes from the streets and alleys of the city did not impair the obligation of plaintiff's franchise contract, and did not constitute a taking of plaintiff's property without due process of law.

The trial court must also have decided that the city was justified in its refusal to pay fire hydrant rentals except to the extent to which the plaintiff was given judgment, upon the ground that it had a right to treat the contract as forfeited, and that such refusal did not constitute a taking of plaintiff's property without due process of law. These matters were all submitted to the trial court, and could only have been submitted to the trial court, upon the ground that the acts of the defendant city violated the rights of the plaintiff under the Constitution of the United States. If they were not submitted upon such ground, the plaintiff did not state a cause of action of which the trial court had jurisdiction. From the certificate of the Circuit Court of Appeals it appears that the plaintiff did state its cause of action in such form as properly to raise constitutional questions. The plaintiff by appealing the cause is seeking to have the appellate court reverse the decision of the trial court and hold that the acts of the defendant did deprive the plaintiff of rights secured to it by the provisions of

the United States Constitution. Therefore it cannot be said that the constitutional questions raised are frivolous. It may be that the facts developed upon the trial, and the findings of the trial court are such that any appeal would be useless, but that can only be determined upon a review of the case upon its merits, the merits including the constitutional question raised by the plaintiff. The plaintiff's rights depend entirely upon the constitutional questions raised, and any review of the case must be for the purpose of determining such constitutional questions, whether the review result in the affirmation or reversal of the decree of the trial court. The cases cited by the plaintiff under the second sub-division are not applicable to such a cause as is described in the certificate of the Circuit Court of Appeals.

In Brolan vs. U. S., 236 U. S. 216, the defendant was prosecuted under an Act of Congress, therefore the jurisdiction of the trial court was not based upon the sole ground of a constitutional question being involved.

In Webber vs. Freed, 239 U. S. 325, suit was brought against the Comptroller of Customs of a port of entry of the City of Newark for a mandatory injunction to compel the said Comptroller to permit the plaintiff to bring into the United States certain photographic films of a pugilistic contest which had taken place in Nevada. The jurisdiction of the Federal Court was not based on the sole ground of the constitutional question involved, but the cause was one arising under the laws of the United States.

In Wabash R. R. Co. vs. Hayes, 234 U. S. 86, and Consolidated Turnpike Co. vs. Norfolk, etc., Ry. Co., 228 U. S., 596, writs of error were sued out from the

Supreme Court of the United States to state courts, upon the alleged grounds that the decisions of such state courts involved federal questions. The cases are not applicable to writs of error or appeals to review decisions of federal courts.

In Equitable Life Assurance Co. vs. Brown, 187 U. S. 308, a writ of error was sued out of the Supreme Court of the United States to the Supreme Court of the District of Hawaii. The court held that the laws governing such writs of error were the laws applicable to writs of error to state courts, and that the federal question involved was too frivolous to warrant a writ of error from the Supreme Court of the United States. In the case at bar no writ of error from a state court is to be considered.

In Rakes vs. United States, 212 U. S., 55, the defendant was indicted and convicted under an Act of Congress. The case was one under the Acts of Congress and the decision is not applicable to the case at bar.

In Hannis vs. Baltimore, 216 U. S. 285, the City of Baltimore sued to recover certain taxes from the Hannis Distilling Company. The action was brought in a state court. The defendant caused the case to be removed to the Circuit Court of the United States for the District of Maryland, because of diversity of citizenship. After removal upon such ground, the defendant sought to allege the statute under which the taxes were being collected was unconstitutional and void. The sole ground of jurisdiction was not a federal constitutional question. The trial court decided against defendant's contention, and he attempted to appeal direct to the Supreme Court. Defendant could have appealed to the Circuit Court of Appeals because

the basis of the jurisdiction of the United States Court was diversity of citizenship. The constitutional question involved was one sought to be injected into the case by the defendant, and was a frivolous one because of previous decisions of the Supreme Court of the United States.

In Knop vs. Monongahela, etc., Co., 211 U. S. 485, the plaintiff, a Pennsylvania corporation, brought a suit in the federal court against the defendants, who were citizens of the State of Louisiana, the jurisdiction of the federal court being based upon diversity of citizenship. The defendant sought to appeal to the Supreme Court of the United States on the ground that there was a federal question involved. The Supreme Court held that there was not, and that the appeal should be dismissed. In the case at bar there is no diversity of citizenship and the sole ground of federal jurisdiction is the constitutional questions raised by plaintiff.

In United States vs. Jahn, 155 U. S. 109, the Circuit Court of Appeals of the Second Circuit certified to the Supreme Court the question of the jurisdiction of the Circuit Court to hear and determine an appeal from the Board of General Appraisers sustaining the action of the Comptroller of Customs in exacting a charge for gauging molasses, under the Acts of Congress. The Supreme Court held that the Circuit Court had jurisdiction and so answered the question of the Circuit Court of Appeals. There is no question involved in that case similar to the question in the case at bar. The jurisdiction of the District Court in the case at bar is not an issue. The contention of the defendant in the case at bar is that the District Court had jurisdiction of the cause upon the sole ground

that the case was one which involved the construction and application of provisions of the Constitution of the United States with respect to the acts of the defendant, and it being necessary to pass upon those questions upon the appeal by the plaintiff, the appeal should have been taken direct to the Supreme Court, and the Circuit Court of Appeals under the Judicial Code does not have jurisdiction to review the cause.

The third part of plaintiff's Point I is to the effect that the case involved other questions than the constitutional questions involved, and that the trial court's decision was based upon these other questions, and that therefore an appeal would lie to the Circuit Court of Appeals. The plaintiff based its right to relief in the federal court solely upon the ground of the constitutional questions involved. Under the circumstances existing in the case, namely the citizenship of the parties and the subject matter of the cause, the plaintiff could not have presented any case to the federal court unless it could base it upon the ground that it was entitled to relief under the provisions of the Constitution of the United States. If the plaintiff had sought to interject an independent cause of action on some other ground, it would have injected a cause of action of which the trial court would not have had jurisdiction. From the certificate of the Circuit Court of Appeals it would appear that plaintiff did not do so, but that all the relief asked for by it was based upon the ground that it was entitled to such relief by reason of the provisions of the Constitution of the United States. The nature of the cause was such that defendant could not inject into the case anything which would permit the Court to decide the cause without a

determination of the issues presented by the plaintiff. The suit was one in equity for an injunction to enjoin the commission of certain threatened acts which the plaintiff alleged would violate its rights under the United States Constitution. Whatever defense could be interposed by the defendant must necessarily be such a defense as would defeat plaintiff's contention that the acts violated its rights under the United States Constitution, and throughout the case, both in the trial court and upon a review of the case, that question must be determined. The authorities cited by the plaintiff under this third sub-division are not applicable to the case at bar, although one of them is apparently so. We will distinguish them in the order cited.

The case of Anglo-American Provision Co. vs. Davis Provision Co. No. 2, 191 U. S., 376, is cited in support of the jurisdiction of the Circuit Court of Appeals in this case. In order to properly understand said case a suit between the same parties, designated as Case No. 1 and reported in 191 U. S., 373, should also be considered. From an examination of both decisions it will appear that both the Anglo-American Provision Company and the Davis Provision Company were Illinois corporations. Upon some cause of action the Davis company had obtained a judgment against the Anglo-American Provision Company in the state courts of New York. About a year and a half before that time The Anglo-American Provision Company had obtained a judgment against the Davis Provision Company in the state courts in Illinois. The Anglo-American Provision Company then brought its action in the New York Supreme Court upon the Illinois judgment.

A demurrer was filed in such case by the Davis Provision Company because of the Code provision of the State of New York preventing one foreign corporation from maintaining an action against another foreign corporation except in certain cases, which did not include the action brought by the Anglo-American Provision Company. The demurrer was sustained and the complaint dismissed. The judgment of the State Supreme Court was affirmed by the Appellate Division and by the Court of Appeals of the State of New York. It was claimed in the state courts that the New York Code provision was void under Article IV of Section 1 of the Constitution of the United States, and a writ of error was sued out from the United States Supreme Court to the Court of Appeals of New York. This Court affirmed the decision of the New York courts.

Immediately after the Supreme Court of New York had entered a judgment dismissing the complaint of the Anglo-American Provision Company against the Davis Provision Company, The Anglo-American Provision Company commenced an action against the Davis Provision Company in the United States Circuit Court for the Southern District of New York. The bill was founded on the matters in Case No. 1. It alleged that the Davis Provision Company recovered a judgment against the plaintiff in New York about a year and a half after the judgment recovered by the plaintiff against the Davis Provision Company in Illinois. It showed the effort of the plaintiff to recover in New York on the Illinois judgment and the action of the New York courts. It alleged that the judgments arose out of the same transaction and that by reason of the New York de-

cision the plaintiff was unable to set off its judgment against that obtained in New York by the defendant. It set up the unconstitutionality of the New York statute, alleged the insolvency of the Davis Provision Company and prayed for a set off of judgments. A demurrer to the bill was overruled by the Circuit Court and an opinion upon the demurrer was written and reported.

Anglo-American Provision Co. vs. the Davis Provision Co., 105 Fed., 536.

By reference to that opinion it will appear that the bill was demurred to for want of jurisdiction and of equity. In passing upon the demurrer the Circuit Court held that under the general laws the plaintiff had the right to have its judgment set off against the defendant's judgment, that the decision of the New York courts might have been entirely correct under the laws of the state limiting the right of foreign corporations to sue in that state, that the effect of the law was to deprive plaintiff of rights which it had under Article IV of Section 1 of the United States Constitution and Sections 1977 and 1979 Revised Statutes of the United States, and that it, the Circuit Court, had jurisdiction by reason of paragraph 16 of Section 629 Revised Statutes of the United States. (Sections 1977 and 1979 are set out in the opinion and paragraph 16 of Section 629 is similar to the 14th paragraph of Section 24 of the present Judicial Code.) Upon these grounds the Circuit Court overruled the demurrer and allowed the defendant to answer over.

Referring to the opinion of the Supreme Court in Case No. 2, it would appear that the defendant did

not ask to have the question of the Circuit Court's jurisdiction certified to the Supreme Court, but that it acquiesced in the decision of the lower court, waived the demurrer and answered over. The answer evidently alleged that the judgment in favor of the Davis Provision Company had been assigned to the defendant Weed for value and under such circumstances it was not subject to the set off claimed. The final decision of the Circuit Court was based upon this question. The allegations of the answer were found to be true and the plaintiff's bill was dismissed. From this final decision of the Circuit Court, the Anglo-American Provision Company took an appeal direct to the Supreme Court. The Supreme Court first took up the question of its jurisdiction of the appeal. It held that such appeal must be maintained, if at all, either as a case in which the jurisdiction of the Circuit Court was in issue, or as a case in which the "law of the state is claimed to be in contravention of the constitution of the United States." The Circuit Court had sustained its jurisdiction and had held the law unconstitutional, thereby deciding both such questions in favor of the plaintiff and with respect to them there was nothing of which the plaintiff could complain. The only matter which the plaintiff could ask to have reviewed was the decision of the Circuit Court concerning the assignment to Weed of the Davis Provision Company judgment. This matter neither involved the jurisdiction of the Circuit Court nor the constitutionality of the state statute, and the Supreme Court dismissed the appeal.

DISTINCTION BETWEEN THE ANGLO-AMERICAN PROVISION CO. VS. THE DAVIS PROVISION CO. CASE NO. 2, AND THE CASE AT BAR.

There is a slight similarity between the two cases. In each the plaintiff and the defendant were residents of the same state, and in each case the plaintiff is appealing. In all other respects the cases are inherently different. In the Anglo-American case the plaintiff did not claim that the defendant had done any act or acts which constituted the taking of plaintiff's property without due process of law, or which deprived the plaintiff of the equal protection of the laws or which impaired plaintiff's contract obligations contrary to the provisions of the Constitution of the United States; while in the case at bar the plaintiff did claim that the acts of the defendant constituted a taking of plaintiff's property without due process of law, deprived it of the equal protection of the law and impaired its contract obligations, all in violation of the Constitution of the United States.

In the Anglo-American Provision Company case the Circuit Court, in effect, held a law of the State of New York unconstitutional, thus deciding that question in favor of the plaintiff. This law was the act of the State Legislature, over which the defendant had no control.

In the case at bar the District Court held the laws of the state constitutional, thus deciding such questions against the plaintiff. Such laws were the ordinances of the City of Raton providing for the construction by it of a municipal water plant and the

ordinance revoking the plaintiff's franchise. These ordinances were the acts of the defendant.

The final decision of the Circuit Court in the Anglo-American Provision Company case depended entirely upon the validity of the assignment by the Davis Provision Company to Weed and involved no constitutional question whatever.

The final decision of the District Court in the case at bar depended entirely upon whether or not the acts of the defendant complained of by the plaintiff constituted a taking of plaintiff's property without due process of law, deprived plaintiff of the equal protection of the laws and impaired plaintiff's contract rights, contrary to the provisions of the United States Constitution, and involved a construction and application of such provisions of the United States Constitution to the facts found by the Court.

In the Anglo-American Company case the Circuit Court decided the constitutional question involved in favor of the plaintiff. In the case at bar the District Court decided the constitutional question involved against the plaintiff.

In the Anglo-American Provision Company case the plaintiff was seeking to have reviewed the decision of the Circuit Court holding that the Davis Provision Company had assigned its judgment to Weed, all other questions having been decided in favor of the plaintiff.

In the case at bar the plaintiff is seeking to have reviewed the decision of the District Court to the effect that the acts of the defendant did not constitute a taking of plaintiff's property without due process of law, did not deprive the plaintiff of the

equal protection of the law and did not impair plaintiff's contract rights, all of which involved the construction and application of the provisions of the Constitution of the United States.

The decision of the District Court against the plaintiff in the case at bar cannot be reviewed without construing and applying the provisions of the Constitution of the United States. So the case at bar falls strictly within the rules laid down in

Union & Planters Bank vs. Memphis, *supra,* and

Carolina Glass Co. vs. S. Carolina, *supra.*

The only distinction between the last two named cases and the case at bar is that in those cases the facts were admitted by the demurrers to the complaints and the Court only had to construe and apply the Constitution with reference to such admitted facts; while in the case at bar the facts were in dispute and the Court had to first determine the true facts and then construe and apply the Constitution with reference to the facts so found.

In Lampasas vs. Bell, 180 U. S., 276, Bell brought his action in the Circuit Court of the United States for the Western District of Texas against the City of Lampasas upon some interest coupons from the bonds of such city. The basis of the jurisdiction of the lower court does not appear from the opinion, but it was evidently diversity of citizenship. The city answered the complaint seeking to raise some Federal Constitutional question. Judgment was for Bell and the city sought to appeal direct to the Supreme Court because of the constitutional question it had raised.

The Supreme Court held that the City had no interest in such constitutional question and that the City did not present any substantial controversy with respect thereto, and therefore the appeal would not lie.

There are no decisions contrary to the rule stated in Union & Planters Bank vs. Memphis, *supra*, and Carolina Glass Co. vs. S. Carolina, *supra*. From a reading alone of the opinion in the case of Pikes Peak Power Co. vs. Colorado Springs, 105 Fed., 1, it might appear that a contrary rule was adopted by the Circuit Court of Appeals of the Eighth Circuit. There was a constitutional question incidentally considered in that case and the Circuit Court of Appeals held that it had jurisdiction. The facts of the case are that the Pikes Peak Power Company was an Iowa corporation and Colorado Springs was a Colorado corporation, and the basis of jurisdiction of the Federal Court was diversity of citizenship. This does not clearly appear from the opinion in the case, so we have appended to this brief a copy of a certificate containing a portion of the bill of complaint showing the allegations of diversity of citizenship upon which jurisdiction of the Federal Court was based.

When it is known that the jurisdiction of the Federal Court in that case was based solely upon diversity of citizenship, the opinion does not detract from the rule laid down by the Supreme Court. The Circuit Court of Appeals of the Sixth Circuit, in the case of the City of Owensboro vs. Owensboro Waterworks Co., 115 Fed. 318, apparently considering that both parties in the Pike's Peak Power Company case were citizens of the same state, criticised the decision

of the Circuit Court of Appeals of the Eighth Circuit and said:

> "We have not failed to notice that the circuit court of appeals for the Eighth circuit, departing from its own former decisions, reached a different conclusion in Pike's Peak Power Co. v. City of Colorado Springs, 44 C. C. A. 333, 105 Fed. 1, from that which we have expressed, being constrained thereto by a misapprehension of the meaning of the language above quoted from Carter v. Roberts. But we have had the advantage of the instruction afforded by the later utterances of the Supreme Court in regard to the interpretation which should be put upon the language employed in the Carter case, and feel relieved from the constraint which induced the decision in the case of Pike's Peak Power Co. v. City of Colorado Springs.
>
> "In this case, for the reasons that a constitutional question was directly involved by the plaintiff's pleading and the jurisdiction of the court below was not based upon diverse citizenship, so as to give us jurisdiction of the appeal upon that ground, we are constrained to think that the exclusive jurisdiction is given to the Supreme Court under the fifth section of the act above mentioned, and that the appeal should be dismissed. It is so ordered."

The Supreme Court, tacitly at least, approved the decision of the Circuit Court of Appeals in the

Owensboro case because it took jurisdiction of a direct appeal from the Circuit Court in the same case.

Owensboro vs. Owensboro Waterworks Co, 191 U. S. 358.

The plaintiff in concluding its argument under the third part of Point I seems to miscomprehend the nature of its cause of action. It seems to take the view that it presented a constitutional question to the trial court simply for the purpose of conferring jurisdiction upon the trial court, and not for the purpose of having the trial court determine the constitutional questions involved. The constitutional questions went to the merits of its cause of action, and no decision upon its cause of action could be rendered without deciding the constitutional questions involved. That the trial court decided the defendant was within its rights in revoking plaintiff's franchise contract and in constructing its own municipal water plant, and putting the same into operation, and in refusing to pay a portion of the fire hydrant rental demanded, does not indicate that the court did not pass upon the constitutional questions raised by the plaintiff. On the contrary, it shows that the court did consider such constitutional questions, but after applying the provisions of the Constitution to the facts found in the case, it determined that the plaintiff was not entitled to relief, except insofar as it was entitled to judgment for certain fire hydrant rentals. The very thing that plaintiff is complaining of upon the appeal is that the trial court did not enforce the plaintiff's alleged constitutional rights, and this goes to the merits of the case.

6. PLAINTIFF'S POINT II.

Under the second point of the plaintiff, it is contended that the plaintiff could have appealed either to the Supreme Court or to the Circuit Court of Appeals. This contention is inconsistent with plaintiff's position under the third part of its first point, and is based upon the decision in Carter vs. Roberts, 177 U. S. 496; Cincinnati H. & D. R. R. Co. vs. Thiebaud, 177 U. S. 615, and Hooper vs. Remmel, 165 Fed. Rep. 336.

In the case of Carter vs. Roberts, Carter, a captain in the United States army, was convicted by a court martial. On his motion a writ of habeas corpus was sued out of the Circuit Court to review his conviction by the United States army court martial. The writ was dismissed and an appeal was taken to the Circuit Court of Appeals of the Second Circuit, which affirmed the judgment in the Circuit Court. He then attempted to taken an appeal and writ of error from the Circuit Court direct to the Supreme Court. The Supreme Court held that he was only entitled to one appeal, and having taken his appeal to the Circuit Court of Appeals, he could not take a second appeal to the Supreme Court. The language quoted by the plaintiff in this case must be applied to the facts of the case, and when so applied it is not applicable to the case at bar. In the Roberts case there were proper grounds for an appeal to the Circuit Court of Appeals. The case was one arising under the laws of the United States and the sole basis of jurisdiction of the Federal Court was not that a constitutional question was involved. The language quoted indicates that an appeal to the Circuit Court

of Appeals is only proper when other questions than constitutional questions are involved. Prior to the decision of this court in the case of Union & Planters Bank vs. Memphis, *supra*, and Carolina Glass Co. vs. S. Carolina, *supra*, the Circuit Court of Appeals of the Sixth Circuit in the case of the City of Owensboro vs. Owensboro Waterworks Co., 115 Fed. 318-322, commented upon the language used in the case of Carter vs. Roberts, *supra*, as follows:

> "The appellant relies upon language used by the chief justice of the supreme court in delivering the judgment in Carter v. Roberts, 177 U. S., at page 500, 20 Sup. Ct. 714, 44 L. Ed. 861, where it was said that, 'when cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals those courts may decline to take jurisdiction, or, where such construction or application is involved with other questions may certify the constitutional question, and afterwards proceed to judgment, or may decide the case in the first instance.' But we think this language was probably intended to be modified by limitations not fully expressed, and that this inference is warranted by former decisions of the court, and by the language used by the chief justice in qualifying the foregoing expression in American Sugar Refining Co. v. City of New Orleans, 181 U. S., at page 282, 21 Sup. Ct. 646, 45 L. Ed. 859, and especially

by his language in delivering the opinion of the supreme court in Huguley Mfg. Co. v. Galeton Cotton Mills (October term, 1901) 22 Sup. Ct. 452, 46 L. Ed.—where he said: 'If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive,' because it is clear that the cases first instanced are within the exclusive jurisdiction of the supreme court."

The case of Owensboro vs. Owensboro Waterworks Company is identical with the case at bar, and, as stated before, the decision of the Circuit Court of Appeals of the Sixth Circuit was tacitly agreed to by this court, because this court did pass upon the cause in a direct appeal from the Circuit Court.

Owensboro vs. Owensboro Waterworks Co., *supra*, 191, U. S. 358.

Since the decision in the Owensboro case and in the case of American Sugar Refining Co. vs. City of New Orleans and Huguley Mfg. Co. vs. Galeton Cotton Mills, cited in the Owensboro case, the Supreme Court has directly decided the question in the two cases of Union & Planters Bank vs. Memphis and Carolina Glass Co. vs. S. Carolina, the decisions in both cases being strictly in line with the decision of the Circuit Court of Appeals of the Sixth Circuit in the Owensboro case.

In the case of Cincinnati H. & D. R. R. Co. vs. Thiebaud, *supra*, Thiebaud, a citizen of Indiana, as

administrator, brought an action against the Cincinnati H. & D. R. R. Company, a corporation, and citizen of Ohio, to recover damages for the wrongful death of one Chris Sweetland, basing his action upon an act of the General Assembly of the State of Indiana. The trial court gave an instruction under the statute upon which the plaintiff relied, and the defendant excepted to the instruction. The record did not show that the objection was upon the ground that the statute contravened the constitution of the United States. The defendant sued out a writ of error from the Circuit Court of Appeals which certified the question of its jurisdiction to the Supreme Court. The defendant also sued out a writ of error direct from the Supreme Court of the United States. Both the certificate and the writ of error direct from the Supreme Court were considered in the same opinion.

The jurisdiction of the trial court was invoked on the ground of diversity of citizenship, and the plaintiff raised no constitutional question. The only constitutional question involved in the case was raised, if at all, by the exception of defendant to the charge by the court to the jury. There being a diversity of citizenship, defendant was entitled to writ of error from the Circuit Court of Appeals, but was not entitled to two writs of error, one from the Circuit Court of Appeals and one from the Supreme Court. The case is so entirely different from the case at bar that we cannot see any application of the decision to the question presented by the Circuit Court of Appeals in this case.

In Hooper vs. Remmel, *supra*, Hooper sued out a writ of habeas corpus to test the validity of his arrest on a warrant issued by a United States Commis-

sioner for the Eastern District of Arkansas, based on a complaint that he had violated an Act of Congress approved April 20, 1904. The case involved both the construction of an Act of Congress and its constitutionality. Upon his writ being denied an appeal was taken to the Circuit Court of Appeals, which court entertained jurisdiction of the appeal because the case involved the construction of an Act of Congress as well as its constitutionality. In one syllabus of the case something is mentioned about state statutes, but there is no mention of state statutes in the opinion. The constitutional question involved was not the sole basis of jurisdiction but the cause was one arising under an Act of Congress and involved the construction of an Act of Congress.

The plaintiff in this case is certainly not entitled to appeal to either the Circuit Court of Appeals or the Supreme Court. It either presented a case to the trial court which involved the construction and application of a provision of the United States Constitution, and which comes within the exclusive appellate jurisdiction of the Supreme Court of the United States, or it presented a case of which no Federal Court had jurisdiction. The acts of the defendant, committed or about to be committed, of which the plaintiff complained, did violate the plaintiff's rights under the United States Constitution, or it did not violate such rights, and that was the sole question to be determined in the trial court, and is the sole question to be determined upon a review of the decision of the trial court. At all stages of the proceeding the court in passing upon this cause, must construe and apply the provisions of the Constitution of the United States with respect to the acts of

the defendant concerning which the plaintiff complains, and therefore under the Judicial Code and under the decisions of the Supreme Court and of the various Circuit Courts of Appeal, the exclusive appellate jurisdiction is in the Supreme Court.

7. POINT III OF PLAINTIFF.

Point three of plaintiff is merely a statement and not an argument. As it says the question certified should be answered in the affirmative, so we say the question certified should be answered in the negative.

8. CONCLUSION.

As stated by the Circuit Court of Appeals in its certificate the suit instituted by the plaintiff was based solely upon the ground that it was one arising under the Constitution of the United States, and the facts constituting such a case appeared from the logical and orderly statement of plaintiff's cause of action in its complaint. It axiomatically follows that if jurisdiction was based solely on the constitutional question involved, that the case was one which involved a construction and application of the provisions of the Constitution of the United States, therefore under the Judicial Code the case was one from which an appeal should be taken direct to the Supreme Court of the United States, and of which the Circuit Court of Appeals does not have appellate jurisdiction. The decisions of the Supreme Court in Union & Planters Bank vs. Memphis, *supra*, and Carolina Glass Co. vs. S. Carolina, *supra*, are directly in point. There are no decisions of the Supreme Court or of any Circuit Court of Appeals which in any way

overrule or modify these two decisions. In the case at bar the constitutional questions raised and presented by the plaintiff in its complaint were decided against it. It is seeking to have that decision reviewed. A review of the decision necessarily involves the construction and application of the provisions of the Constitution to the facts admitted, or established by the proof in the case. Therefore the question of the Circuit Court of Appeals should be answered in the negative.

Respectfully submitted,

GEORGE L. NYE,
Solicitor for Defendant.

PLEAS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

BE IT REMEMBERED, that heretofore, and on, to-wit, the 27th day of June, A. D. 1901, came the plaintiff by Henry M. Blackmer, Guy LeR. Stevick and L. M. Goddard, its solicitors, and filed in the Circuit Court of the United States for the district of Colorado, its bill of complaint in a certain cause in said Circuit Court pending wherein Pike's Peak Power Company, a corporation, was plaintiff, and The City of Colorado Springs, a municipal corporation, was defendant.

And said bill of complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Colorado. } ss.

IN THE CIRCUIT COURT OF THE UNITED TATES WITHIN AND FOR THE DISTRICT OF COLORADO.

Pike's Peak Power Company, a corporation,
Plaintiff,
vs.
The City of Colorado Springs, a municipal corporation,
Defendant.

IN EQUITY.

BILL OF COMPLAINT.

Pike's Peak Power Company, a corporation duly organized and existing under and by virtue of the

laws of the State of Iowa, and a citizen and resident of said State of Iowa, and of the United States, brings this, its bill of complaint against the City of Colorado Springs, a city organized and existing under and by virtue of the laws of the State of Colorado, and a citizen and resident of said State of Colorado, and unto your Honor showeth:

That the matters in dispute herein exceed in value the sum of Two Thousand Dollars ($2,000.00), exclusive of interest and costs, and that this is a controversy between citizens of different states, and thereupon your orator complains and says:

First. That the plaintiff is, and at all times when it is hereinafter referred to was a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having an office in the City of Colorado Springs, El Paso County, Colorado, and duly authorized and empowered to transact business and own property within the said State of Colorado by virtue of a full compliance by it with the laws of the State of Colorado regarding foreign corporations doing business within said State of Colorado.

Second. That the defendant is, and at all times hereinafter mentioned was a city organized and existing under and by virtue of the laws of the State of Colorado.

Third. That on and prior to the 25th day of November, A. D. 1895, the defendant city was and still is the owner of and in the possession of a system of water works and certain lands, reservoirs, pipe lines and appliances used for conveying water from the sources of supply near the top of Pike's Peak to the bottom of said peak, and thence into a

reservoir or reservoirs at or near the bottom of said peak; that the said water was and is conveyed by open streams and partially in iron pipes.

(Endorsed) No. 4177. In Equity. Circuit Court of U. S. Dist. of Colo. Pike's Peak Power Co. plaintiff vs. City of Colorado Springs, defendant. BILL OF COMPLAINT. Filed June 27, 1901. Robert Bailey, Clerk.

UNITED STATES OF AMERICA,
District of Colorado. } ss.

I, CHARLES W. BISHOP, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of a portion of the bill of complaint heretofore filed in the Circuit Court of the United States for the district of Colorado, and in a certain cause lately in said circuit court pending wherein Pike's Peak Power Company, a corporation, was plaintiff, and The City of Colorado Springs, a municipal corporation, was defendant, as fully and completely as the same still remains on file in my office at Denver.

IN TESTIMONY to the above, I do hereunto sign my name and affix the seal of said district court at the City and County of Denver in said district, this twenty-fifth day of March, A. D., 1919.

CHARLES W. BISHOP,
Clerk.

(Seal)